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No. 80-1808

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CORNELL FULLER, *Petitioner-Appellee,* v. CHARLES E. ANDERSON, *Respondent-Appellant.*	ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed September 18, 1981.

Before: EDWARDS, Chief Judge, WEICK and KEITH, Circuit Judges.

KEITH, Circuit Judge, delivered the opinion of the Court, in which EDWARDS, Chief Judge, joined. WEICK, Circuit Judge, (pp. 10-16) filed a separate dissenting opinion.

KEITH, Circuit Judge. This is an appeal by the State of Michigan from a judgment of the United States District Court for the Eastern District of Michigan granting a petition for a writ of habeas corpus. The district court granted the writ because it found that the petitioner's jury verdict of felony murder was not supported by sufficient evidence. For the reasons discussed below, we affirm the judgment of Chief Judge John Feikens.

[2] I

Petitioner Cornell Fuller was convicted by a jury of felony murder in the Recorder's Court of Detroit, Michigan.[1] He was sentenced to serve life in prison and has served at least nine years of that sentence.

On the morning of May 18, 1970 a fire destroyed the home of Safronia Turner at 1554 Lemay in Detroit. Mrs. Turner and several children managed to escape the blaze, but two of Mrs. Turner's children—Ruth and Regina—were killed in the fire. A fire department investigation revealed that the fire was apparently caused by a "Molotov cocktail" deliberately thrown into the rear of the Turner residence. Petitioner Fuller was arrested and charged with first degree murder in violation of 2 MCLA 750.316.[2] The State alleged, as the underlying felony, that Fuller aided and abetted Zerious Meadows in deliberately setting[3] the fire at the Turner residence.

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[1]

This conviction was affirmed by the Michigan Court of Appeals, *People* v. *Fuller*, 44 Mich. App. 297 (1973), and by a divided Michigan Supreme Court, *People* v. *Fuller*, 395 Mich. 451 (1975).

[2]

MCLA 750.316; MSA 28.548 provides:

> First Degree Murder—All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

[3]

MCLA 750.72 provides that specific intent is required in order to commit arson:

The following evidence was introduced at the Fuller trial. Marshall Robinson, Captain of the Detroit Fire Department, testified that a "Molotov cocktail" appeared to have caused the fire. Robert Kuntz, a chemist with the Detroit Fire Department, testified that gasoline was present on portions of the house siding.

Helen Brownlee, who lived next-door to the Turner residence, testified that on the morning of May 18 she saw five or six boys together in a group in front of the Turner home. She testified that Cornell Fuller was one of the boys. She saw Fuller and one or two other boys go through the front gate of the Turner yard. They went to the rear of the Turner residence. At that time, she saw one of the boys, who was still in front, throw something. She yelled at the boys because she thought they had thrown something at her house. She ran out of her house, onto the front porch, and saw that the Turner house was on fire.

Fourteen-year old Jeffrey Coleman, a friend of one of the Turner children, testified that on the morning of the 18th he left his house at eight o'clock to head for the Turner's residence. When he went through the backyard of a neighbor

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Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years.

MCLA 767.39; MSA 28.769 provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

and approached the Turner's residence from the rear, he saw Zerious Meadows on the Turner's back porch. He saw Cornell Fuller standing inside the backyard by the gate. Coleman testified that he saw Zerious Meadows ignite a rag that was stuffed inside a bottle. Meadows then threw the bottle against the Turner's house, starting a fire. He saw Meadows then strike a match and start another fire. Jefferey Coleman also testified as follows:

> Q. Now, after he had struck the match and started the second fire what happened then?
>
> A. Well, he had jumped off the porch and then they ran down the alley towards Kercheval.
>
> Q. When you say they ran down the alley, who ran down the alley?

[4]

> A. Zerious and Cornell.
>
> Q. Towards Kercheval?
>
> A. Yes, sir.
>
> Q. During the time that Zerious Meadows was throwing the bottle against the side of the house or against the side of the porch and lighting the match which set—started the second fire did you see what Cornell Fuller was doing?
>
> A. He was standing by the gate, looking around.
>
> Q. When you say he was looking around what, exactly, was he doing?
>
> A. I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval.

Q. He looked towards Jefferson and looked back towards Kercheval?

A. Yes, sir.

Q. Did he do that once or more than once?

A. He did it more than once.

Q. He did it more than once—how many times—

THE COURT: Was this the alley gate or the gate toward the front of the house?

A. It was the alley gate.

Q. How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kercheval?

A. I wouldn't know.

Q. But it was more than once; is that correct?

A. Yes, sir.

Q. Was it more than twice?

[5]

A. Yes, sir.

Q. Now, during the time this was taking place, Jefferey, did you hear any words spoken between Zerious and Cornell?

A. No.

Q. Did you say anything to them?

A. No.

Q. Now, after—strike that, please—after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

A. Yes, sir.

Q. Did they enter the alley?

A. Yes, sir.

Q. Did they enter the alley through the gate that Cornell Fuller was standing by?

A. Yes, sir.

Q. And then they started running; is that correct?

A. Yes, sir.

Q. Were they running together or separately, Jefferey?

A. Together.

Q. And they were running towards Kercheval; is that correct?

A. Yes, sir.

App. 83-86.

On cross-examination, young Coleman testified that he attended "special school", having attended regular public schools only until the third grade. At the time of trial, young Coleman resided in a youth home because, as he stated, he had run away from home. Although Coleman testified that he approached the Turner residence from the rear and then saw

[6]

the events as related in his testimony quoted above, he may have been one of the boys who were huddled in front of the Turner house shortly before the fire. Prosecution witness Helen Brownlee testified that she thought a "Jefferey" was with the group of boys. (transcript at 151, 164, 168). In addition, it is undisputed that Coleman failed to warn the Turner's that their house was on fire even through he was at the scene at the time the fire began. Further, Coleman had a fight with one of the Turner children about a month before the fire (transcript at 195-6 and 235), and investigators at least initially were of the view that Coleman was one of the perpetrators of the arson.[4]

Gary Martin testified that on the morning of the fire Jefferey Coleman stopped by his house. Martin looked out his window, after Coleman left, and saw Cornell Fuller, Zerious Meadows and four other boys in the alley near the Turner house. A few minutes later, he saw the boys again when they came through a yard running toward the alley. Fuller and Meadows were still in the group. Finally, Jefferey Coleman returned to Martin's residence and said that the Turner house was on fire.

Detective Sergeant John Roffey testified that he interviewed Mrs. Brownlee the day after the fire. She did not identify

---

[4]

At the trial of Zerious Meadows, Jeffrey Coleman testified that after the fire he was arrested, taken to a local police precinct, questioned about his involvement and taken to the juvenile home. *See People* v. *Meadows*, Recorder's Court No. 71-01558, trial transcript pp. 257-58.

In the instant habeas petition, Fuller alleged that the failure of the prosecutor to disclose the above facts during Fuller's trial, and the failure of the prosecutor to disclose Coleman's juvenile record, deprived Fuller of due process of law. Judge Feikens in granting the petition found it unnecessary to reach this issue.

anyone at that time as being involved in the fire, and Detective Roffey testified that her in-court testimony, implicating Fuller, was a surprise to him.

The lone witness for the defense was Hattie Fuller, the mother of the petitioner. She testified that on the morning of the fire her son was at home asleep until about 9:00 a.m.

II [7]

The issue on appeal is whether the foregoing facts are sufficient to sustain the murder conviction of Cornell Fuller. In *In re Winship*, 397 U.S. 358, 364 (1970), the Supreme Court held that the due process clause requires that all criminal convictions must be based upon proof beyond a reasonable doubt. In *Jackson* v. *Virginia*, 443, U.S. 307 (1979), the Supreme Court held that this standard has application in the law of habeas corpus:

> [I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Id.* at 324.

In applying this standard in habeas corpus cases, the federal courts must review the evidence in the light most favorable to the prosecution. The petition must be denied if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 39. *See also Moore* v. *Duckworth*, ... U.S. .... 99 S.Ct. 3088 (1979); *Brewer* v. *Overberg*, 624 F.2d 51 (6th Cir. 1980), *cert. denied*, ... U.S. ...., 101 S.Ct. 873 (1981); *Davis* v. *Campbell*, 608 F.2d 317 (8th Cir. 1979). The district

court recognized that conflicts in the evidence must be resolved in favor of the State, but nevertheless found that the evidence introduced at trial was too meager to support the petitioner's conviction. We agree with the district court's conclusion.

Under *Jackson* v. *Virginia*, we must examine the sufficiency of the evidence here in support of each element of the petitioner's offense. Fuller was convicted of felony murder in Michigan. A felony murder conviction under MCLA 750.316; MSA 28.548 requires proof of each element of the underly-

[8]

ing felony. *People* v. *Allen*, 39 Mich. App. 483, 494 (1972) (Levin, J., dissenting), *adopted*, 390 Mich. 383 (1973). Thus, Fuller could only be convicted under this statute if the jury could rationally have found him guilty of attempted arson beyond a reasonable doubt.[5]

In Michigan, in order to establish arson, the prosecution must show that a person willfully and maliciously burned a dwelling house. *See* note 3 *supra*. In order to prove attempted arson the prosecution must show that the aider and abettor, "if not himself possessed of the requisite specific intent, . . . [at least] rendered his aid and assistance to the principal actor with the knowledge that the principal himself possessed the intent necessary to be guilty of the crime." *People* v. *Rigsby*,

---

[5]

People v. *Aaron*, 409 Mich. 672, 733 (1980), abolished the felony-murder rule in Michigan. After this ruling the category of malice arising from the intent to commit a felony was struck down. The Michigan Supreme Court held that malice would have to be independently proven for each element of an alleged offense. However, this decision has prospective effect only, *id.* at 734, and has no effect on petitioner's case.

92 Mich. App. 95, 97 (1979). *See also People* v. *Gordon*, 60 Mich. App. 95, 97 (1979). *See also People* v. *Gordon*, 60 Mich. App. 412 (1975); *People* v. *Poplar*, 20 Mich. App. 132 (1969). The Michigan Supreme Court has held:

> Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abetter or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiesence or consent.

People v. *Burrel*, 253 Mich. 321, 323 (1931) (quoting 1 Cyc. Crim. Law [Brill] § 233); *People* v. *Casper*, 25 Mich. App. 1, 5 (1970). In other words, the accused must take some conscious action designed to make the criminal venture succeed in order to be guilty of aiding and abetting. *People* v. *Cooper*, 326 Mich. 514 (1950); *People* v. *Gordon*, 60 Mich. App. 412, 418 (1975).

[9]

The district court correctly concluded that the evidence introduced at petitioner's trial only showed that on the morning of May 18 Fuller was present at the Turner residence along with Zerious Meadows and the other boys. The evidence showed that Fuller looked around while Meadows started the fires. But as Judge Feikens pointed out:

> This *suggests*, as Jefferey Coleman surmised, that the petitioner *may have been* acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew that Zerious Meadows planned to do is simply too meager to support conviction. (emphasis in original)

We note that there was no evidence at trial that the "Molotov cocktail" which started the fire was prepared in advance, or, if it was, whether any of the boys other than Zerious Meadows knew that the "Molotov cocktail" existed. There was of course no evidence that any of the boys, except Fuller, participated in the manufacture of the "Molotov cocktail".

Moreover, there was no direct evidence that the youths approached the Turner house with intent to set the house on fire. Assuming Zerious Meadows had this intent, however, there was no evidence that it was shared by petitioner or the other boys.

The only direct evidence supporting the State's contention that Fuller "stood guard and acted as a lookout" for Zerious Meadows was Jefferey Coleman's testimony that over a period of several minutes Fuller turned his head from side to side "more than twice". We agree with the district court that this is insufficient to establish beyond a reasonable doubt that Fuller took conscious action to aid Meadows' commission of arson.

Accordingly, the judgment of the district court granting the petition for habeas corpus is affirmed.

[10]

WEICK, Circuit Judge, dissenting: I respectfully dissent. Petitioner Fuller was convicted by a jury in the Recorder's Court of Detroit, Michigan, as an aider and abettor of the arson murder of one of two young girls who died in the fire. His defense was an alibi and in his motion for judgment of acquittal filed after the verdict, he challenged the sufficiency of the evidence. The presiding judge of the Recorder's Court denied his motion. In his opinion and order

denying Fuller's motion for a new trial, the Judge of the Recorder's Court stated, *inter alia;*

> It was not contended that the defendant was the one who threw the fire bomb which burned the house, but the evidence established that he was the look-out while Zerious Meadows (subsequently tried in a separate case on this same charge) threw the fire bomb and set a fire by pouring gasoline on the dwelling in question.
>
> Defense counsel in his Motion for a New Trial makes much of the fact that Cornell Fuller was only seen to run to the alley of the premises here involved and look up and down the alley, but the evidence also indicated that he was the look-out and, therefore, an accessory to the crime, equally chargeable as a principal under Section 767.26, Compiled Laws, 1948.

Upon appeal to the Michigan Court of Appeals, the court held, in a unanimous opinion in *People* v. *Fuller*, 44 Mich. App. 297 (1973):

> 1. Homicide—Murder—Evidence—Inferences.
>
> A jury could reasonably infer that the defendant was a party to the offense of aiding and abetting in the commission of murder where he was shown to have come to the scene in the company of the principal, stood at a gate near the alley behind the house while the principal lit and threw a Molotov cocktail, looked up and down the alley more than once, and ran from the scene with the principal.
>
> [11]

Presiding Judge Quinn, who wrote the opinion for the court stated:

> The first issue is a weight of the evidence question. Our inquiry is, was evidence produced which, if believed, could certainly lead to a reasonable inference that defendant was a party to the offense? *People* v. *Ford*, 19 Mich. App. 519 (1969). There was evidence that defendant came to the scene with Meadows and others; that defendant stood at a gate near the alley behind the house while Meadows lit and threw the Molotov cocktail; that during this time, defendant looked up and down the alley more than once; and that defendant ran from the scene with Meadows. From these facts a jury could reasonably infer that defendant was a party to the offense.

The Supreme Court of Michigan in *People* v. *Fuller*, 393 Michigan 451 (1975), affirmed the conviction in a split decision holding:

> Cornell Fuller was convicted by a jury in Recorder's Court of Detroit, Thomas L. Poindexter, J., of first-degree murder. The prosecution contended that he aided and abetted, by acting as a lookout, in an arson which resulted in the death of two girls. The Court of Appeals, Quinn, P. J., and V. J. Brennan and O'Hara, JJ., affirmed (Docket No. 11308). Defendant appeals. *Held*:
>
> 1. A jury may believe or disbelieve, in whole or in part, any of the evidence presented.
>
> 2. Evidence was presented which, if believed by the jury, showed that the defendant acted as a lookout for the arsonist.

3. The jury determined that the prosecution had negated every reasonable theory consistent with the defendant's innocence of the crime chraged.

Conviction affirmed.

[12]

It is noteworthy that in affirming the conviction, the Supreme Court of Michigan held that the jury determined that the prosecution had negated every reasonable theory consistent with the defendant's innocence of the crime charged. The Supreme Court of the United States held that this was more than the constitutional requirement in *Jackson* v. *Virginia,* 443 U.S. 307, 326 (1979), *citing Holland* v. *United States,* 348 U.S. 121, 140 (1954). In other words, the Michigan Supreme Court in affirming the conviction applied a standard of review more strict than the constitution requires and petitioner received the benefit of this erroneous standard. The decision of the Michigan Supreme Court is entitled to great weight since it applied a standard of review more strict than required by the constitution, *Jackson* v. *Virginia, supra,* p. 326.

At his trial, petitioner's counsel did not object to any of the instructions of the trial court to the jury. His sole defense was alibi. In his opening statement to the jury, counsel for Fuller stated:

> As indicated by the Court, he (Fuller) is not named as the party who threw the incendiary device against this building; he was merely named as a party who was standing by, but you must be convinced as to his identity; that he was, in fact, the party that was an accessory to this crime and standing by.

Now, on behalf of the defendant, we will produce witnesses that will establish his whereabouts at the time of this incident. They will testify that he was at a place other than the home of the Taylor's on May 18, 1970—

THE COURT: I think it is the Turner home, Mr. Reilly.

MR. REILLY: Sorry, your Honor, the home of the Turner's—this incident occurred early in the morning. The witnesses will testify that the defendant was in bed —home in bed asleep.

[13]

Now, the Prosecutor has a different approach to this; it is a question of who you believe—who is telling the truth which is very often a different task to decide but I think the defense will clearly indicate that the defendant was, in fact, in bed the Morning that this incident occurred.

Aiding and abetting—aided and abetted—the legal concept, as the Court indicated, that would mean somebody that is a party to an incident—I think you are all familiar with that. You must be firmly convinced that the defendant was the party who aided and abetted in this incident. There is no question here as to the fact that the incident occurred and the deaths were a result of this incident and the Prosecution will show that the burning, in fact, did take place and the deaths were a result of the burning—the burning emanated from an incendiary device, commonly known as a Molotov cocktail. Testimony will be given with regard to a chemical analysis as to what happened. That is not the issue; the issue is the tragic incident, a very sordid situation where the

> deaths were pitiful. There is no question about that. The question is whether or not the defendant, in fact, was the party standing at the scene. That is the only question that you have to find—the fact you have to determine.
>
> It is indeed conceivable that the witnesses that will testify that they saw the defendant at the scene could have been mistaken. I want you to consider that also.

Fuller's only witness as to the alibi was his mother who testified that petitioner was home sleeping on his bed at the time the arson was committed. The only trouble with the mother's testimony was that it conflicted with the testimony of three other witnesses. Fuller did not testify although he was present in court at the trial. It was solely for the jury to decide who was telling the truth.

[14]

The decision of the Supreme Court of Michigan is final that Fuller's conviction was in conformity with the law of the State of Michigan and it is binding on federal courts with respect not only to the factual findings but also as to the law of the State. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 101 S.Ct. 764 (1981).

There was abundant proof offered by the state to support the finding of the jury that Fuller not only accompanied the arsonist to the dwelling set on fire, but also acted as a lookout. After the dwelling had been set on fire, the arsonist and Fuller ran away together. If Fuller was innocent of any wrongdoing, why did he run away?

Every element of the crime of aiding and abetting the arsonist was proven beyond a reasonable doubt as was held

by the Supreme Court of Michigan and is in conformity with the decision of the Supreme Court of the United States in *In re Winship*, 397 U.S. 358 (1970). In a habeas corpus proceeding, the federal courts do not have jurisdiction for direct appellate review. In almost every criminal trial in the state, as well as federal courts, the evidence is conflicting and must be resolved. In a collateral proceeding as was held by the Supreme Court in *Jackson* v. *Virginia, supra*, the evidence must be viewed in the light most favorable to the prosecution and the habeas petition denied if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. This standard applies retroactively. *Pilon* v. *Bordenkircher*, 444 U.S. 1 (1979). The standard was incorrectly applied by the district court when it granted the writ.

With the abundance of evidence in the present case, together with the inferences properly deducible therefrom, I submit that the jury did not act irrationally in finding the defendant Fuller guilty as an aider and abettor, nor did the trial judge in denying the motion for judgment of acquittal and in sentencing the defendant, nor did the three judges

[15]

of the Michigan Court of Appeals in affirming the judgment of conviction. Nor did the majority of the judges of the Supreme Court of Michigan in affirming the judgment of the Michigan Court of Appeals.

I submit again that the federal courts in habeas proceedings are bound by the factual findings of the state courts. We are deluged with habeas corpus proceedings, most of which involve the issue as to the sufficiency of the evidence. The rule formerly was the no evidence standard which authorized collateral intervention only where there was no evi-

dence at all to support an important element of the crime. The no evidence standard was modified to the "rational trier of fact" standard, *Jackson* v. *Virginia, supra,* but this new standard has not stemmed the tide which appears to be increasing and has added to the confusion.[1]

---

[1]

Footnote 7 in *Jackson* v. *Virginia* states:

> And the Court of Appeals for the Sixth Circuit recently recognized the possible impact of *Winship* on federal habeas corpus in a case in which it held that "a rational trier of fact could have found the defendant . . . guilty beyond a reasonable doubt." *Spruytte* v. *Koehler,* affirmance order, 590 F. 2d 335. An even more recent case in that court provoked a lively debate among three of its members regarding the effect of *Winship* upon federal habeas corpus. The writ was granted in that case, even though the trial record concededly contained "some evidence" of the applicant's guilt. See *Speigner* v. *Jago,* 603 F. 2d 1208 (CA6).

In *Speigner,* the victim was kidnapped, robbed and brutally beaten and shot with a pistol and shotgun by the two criminals, Roger Scott and Henry Speigner, alias Frank Mathews. He was shot in the chest with a pistol and in the back of the head and neck with a shotgun. The two criminals then stole the victim's automobile and dumped his body in a street in Cleveland and then proceeded directly to Youngstown, Ohio, where they were arrested later in the same day by state police. Scott told the police that he rented the automobile from the victim for $15.00. The back seat of the automobile was covered with the victim's type blood and the automobile was damaged. Speigner when arrested was seated in the passenger's seat. The shotgun was under his seat. Speigner was convicted of murder by a jury in the state court, which was affirmed by the state appellate court and leave to appeal was denied by the Supreme Court of Ohio on the ground that there was no debatable constitutional question. The district court granted a writ of habeas corpus which the court affirmed with a dissent, as above indicated, and Speigner was set free.

Speigner's cohort Scott was likewise convicted in the state court which conviction was affirmed by the state appellate court and appeal denied by the Supreme Court of Ohio. The district court granted Scott's application for a writ of habeas corpus and upon appeal to this court the judgment of the district court granting the writ of habeas corpus was

[16]

I would reverse the district court's grant of the writ of habeas corpus and remand for dismissal of the petition.

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reversed, the cause remanded for further proceedings consistent with the opinion, this court distinguishing *Speigner* on the basis of additional evidence linking Scott with the crime not shown in *Speigner*. *Perini* v. *Scott*, ... F.2d ..... (6th Cir. 1981, No. 80-3219). Thus one murderer was set free by decision of this court while his confederate was not granted relief.

Another case involving a criminal who was set free by habeas relief in a split decision of this court. He had stabbed his former girlfriend some 45 times with a pen knife permanently maiming her and had been convicted in the state court of attempted murder. His conviction had been affirmed by the Michigan Court of Appeals and leave to appeal denied by the Michigan Supreme Court. The district court denied habeas relief and we reversed for an alleged trivial error in an unobjected to charge of the court to the jury. *Burton* v. *Bergman*, No. 80-1497 (6th Cir.). Burton did not even testify and the victim's testimony was unrefuted. The case should also have been affirmed on the ground that the alleged error in the court's instruction, if any, was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORNELL FULLER, Petitioner vs. CHARLES E. ANDERSON, Respondent	Civil Action No. 79-73171

MEMORANDUM OPINION

Petitioner, Cornell Fuller, a prisoner at the State Prison of Southern Michigan at Jackson, brings this application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. In 1970, he was convicted of felony murder by a jury in the Recorder's Court of the City of Detroit, M.C.L.A. § 750.316. His conviction was affirmed by the Michigan Court of Appeals and by a divided Michigan Supreme Court. *People v. Fuller*, 44 Mich. App. 297 (1973), *aff'd*, 395 Mich. 451 (1975). Supreme Court Justices Kavanagh and Levin dissented, recommending reversal of the conviction for insufficient evidence. Petitioner now urges that the Constitution requires me to adopt the views of that dissent.

This issue is governed by *Jackson v. Virginia*, 443 U.S. 307 (1979), and *In re Winship*, 397 U.S. 358 (1970). In *Winship* the Supreme Court held that due process requires a criminal conviction must be based upon proof of guilt beyond a reasonable doubt. In *Jackson v. Virginia*, the Court adapted this standard to the context of habeas corpus:

> [I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record

> evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

443 U.S. at 324. The evidence must be reviewed in the light most favorable to the prosecution, and the petition denied if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. This standard applies retroactively to cases decided before it was announced. E.g., *Pilon v. Bordenkircher*, 444 U.S. 1 (1979); *Llewellyn v. Stynchcombe*, 609 F.2d 194 (5th Cir. 1980); *Brinlee v. Crisp*, 608 F.2d 839 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980); *Davis v. Campbell*, 608 F.2d 317 (8th Cir. 1979); *Pate v. Wainwright*, 607 F.2d 669 (5th Cir. 1979); *Sims v. Hopper*, 603 F.2d 581 (5th Cir. 1979).

Petitioner's conviction arose out of the deaths of two young girls in a fire deliberately set in back of their home.[1] A next-door neighbor saw the petitioner near the house with several other teenage boys. (Tr. 131-133). No testimony even suggested that the petitioner may have set the fire. All evidence demonstrated that Zerious Meadows, 16, lit a white cloth in a coke bottle, and threw it toward the house. (Tr. 210-215). According to 14-year old Jeffrey Coleman, the petitioner was standing by the back gate of the house when this occurred. Coleman testified as follows:

> Q: Now after he [Meadows] had struck the match and started the second fire, what happened then?
>
> A: Well, he had jumped off the porch and then they ran down the alley towards Kercheval.
>
> Q: When you say then ran down the alley, who ran down the alley?
>
> A: Zerious and Cornell.

---

[1] Petitioner was charged with the murder of only one of the girls.

Q: Towards Kercheval.

A: Yes, sir.

Q: During the time that Zerious Meadows was throwing the bottle against—the side of the house or against the side of the porch and lighting the match which set—started the second fire did you see what Cornell Fuller was doing?

A: He was still standing by the gate, looking around.

Q: When you say he was looking around what, exactly was he doing?

A: I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval.

Q: He looked towards Jefferson and looked back towards Kercheval?

A: Yes, sir.

Q: Did he do that once or more than once?

A: He did it more than once.

Q: He did it more than once—how many times—

THE COURT: Was this the alley gate or the gate toward the front of the house?

A: It was the alley gate.

Q: How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kercheval?

A: I wouldn't know.

Q: But it was more than once; is that correct?

A: Yes, sir.

Q: Was it more than twice?

A: Yes, sir.

Q: Now, during the time that this was taking place, Jeffrey, did you hear any words spoken between Zerious and Cornell?

A: No.

Q: Did you say anything to them?

A: No.

Q: Now, after—strike that, please—after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

A: Yes, sir.

Q: Did they enter the alley?

A: Yes, sir.

Q: Did they enter the alley through the gate that Cornell Fuller was standing by?

A: Yes, sir.

Q: And then they started running; is that correct?

A: Yes, sir.

Q: Were they running together or separately, Jeffrey?

A: Together.

Q: And they were running towards Kercheval; is that correct?

A: Yes, sir.

(Tr. 215-218). Another witness testified that he saw the petitioner, Meadows, and four other teenagers walking together in an alley, and later saw the petitioner and Meadows run through a yard and down an alley. (Tr. 287-89; 292-96). This testimony was all that linked the petitioner with the arson and resulting deaths.

The prosecutor's theory was that the petitioner had acted as a lookout, and had, therefore, aided and abetted the commission of the felony. At the close of the State's evidence, Fuller moved for a directed verdict of acquittal. The judge denied the motion, stating:

> The question in this case is a close one. As I regard the testimony the defendant's complicity in the case depends almost completely on the fact that he was present at the scene of the crime and that he was seen going to it and seen running afterwards. There was very meagre evidence to call him a look-out in this particular case; however, the Court is of the impression that we do have a borderline prima facie case in this instance—a border line prima facie case—and, accordingly, the court will reserve its ruling on the motion for a directed verdict. It seems to me that the testimony is the kind that would be—that there would be a high probability that the jury would return a verdict of not guilty in this case, but where there is a prima facie case the Court cannot speculate on it—on the jury's decision in the case and the Court will, however, reserve a ruling on the motion.

(Tr. 324-325). The jury returned a verdict of guilty, and the court thereupon denied a motion to overturn the verdict. Petitioner received the mandatory life sentence for the crime.

Both the Michigan Court of Appeals and the Michigan Supreme Court considered the issue of the sufficiency of the evidence. The Supreme Court, in a 3-2 decision, held that the evidence was sufficient to convict. The dissent argued strongly that "there was simply too many inferences that would have to be drawn, one piled upon another, to justify conviction of this defendant." *People v. Fuller, supra,* at 459.

To rule upon the petition, I must examine the sufficiency of the evidence in support of each element of the offense. In Michigan, conviction of felony murder requires proof of each element of the felony. *People v. Olsson,* 56 Mich. App. 500, 504 (1974). Thus, petitioner could only be convicted under M.C.L.A. § 750.316 if the jury could find him guilty of arson beyond a reasonable doubt.

An arson conviction, under M.C.L.A. § 750.72, requires that a person "wilfully or maliciously burn" a dwelling house. Section 750.71 includes aidors and abettors within the scope of this offense. In *People v. Rigsby,* 92 Mich. App. 95, 97 (1979), the Michigan Court of Appeals described the mental state necessary to sustain the conviction of an aidor or abettor as a principal. "The aidor and abettor of a specific intent crime, if not possessed of the requisite specific intent, must be shown to have rendered his aid and assistance to the principal actor with the knowledge that the principal himself possessed the intent necessary to be guilty of the crime." *Accord, People v. Gordon,* 60 Mich. App. 412 (1975); *People v. Poplar,* 20 Mich. App. 132 (1969). I must grant the petition unless the jury could rationally find, beyond a reasonable doubt, that the petitioner either (1) intended wilfully or maliciously to burn the Turner residence; or (2) knew that

Zerious Meadows intended wilfully or maliciously to burn the home.

The evidence outlined above cannot constitutionally sustain a finding that the petitioner had either of the elements of intent required by Michigan law. The evidence establishes only that the petitioner was with Zerious Meadows and other boys before and after the fires were started, and that the petitioner was looking around while Meadows started them. This *suggests*, as Jeffrey Coleman surmised, that the petitioner *may have been* acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew what Zerious Meadows planned to do is simply too meager to support conviction. The state has failed to meet the constitutional burden imposed by *In re Winship*, and no rational jury could conclude that it succeeded.

The petitioner has raised three other issues, which I do not need to decide.

For this reason, the petition for a writ of habeas corpus is GRANTED.

John Feikens /s/
JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

Dated: November 20, 1980
Detroit, Michigan

A TRUE COPY

CLERK U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Bonnie Humm /s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORNELL FULLER, Petitioner vs. CHARLES E. ANDERSON, Respondent	Civil Action No. 79-73171

ORDER GRANTING PETITION FOR A WRIT OF HABEAS CORPUS

At a session of said Court held in the Federal Building at Detroit on the 20th day of November, 1980

PRESENT: THE HONORABLE JOHN FEIKENS, CHIEF UNITED STATES DISTRICT JUDGE

The matter having come before this Court on Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and the Court being fully advised in the premises, and for the reasons set forth in the attached Memorandum Opinion.

IT IS ORDERED that the petition for a writ of habeas corpus be, and the same hereby is, GRANTED.

JOHN FEIKENS /s/

CHIEF UNITED STATES
DISTRICT JUDGE

A TRUE COPY

CLERK U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

By Bonnie Humm /s/

DEPUTY CLERK

NO. 80-1808
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED—JAN 23 1981

JOHN P. HEHMAN, Clerk

CORNELL FULLER, Petitioner-Appellee, v. CHARLES ANDERSON, Respondent-Appellant.	**ORDER**

BEFORE: WEICK, LIVELY, and JONES, Circuit Judges

Charles Anderson has filed a motion for stay pending appeal of the judgment of the Eastern District of Michigan. In its order of November 20, 1980, the district court granted Cornell Fuller's application for a writ of habeas corpus, 28

U.S.C. §2254. Because the district court granted petitioner's motion for bail pending appeal, Fuller was released from custody on January 7, 1981. Thus, Anderson's motion was restyled as a motion to modify a custody order. Fed. R. App. P. 23(d).

It is well settled that "pending appeal by the custodian of a prisoner who has successfully obtained a writ of habeas corpus the prisoner is presumptively entitled to release." *United States v. Rundle*, 461 F.2d 768 (3rd Cir. 1972), Fed. R. App. P. 23(c). Though the ultimate question to be decided in this court's ruling on the merits of the habeas corpus appeal is Fuller's freedom, our present inquiry is much less awesome. Fed. R. App. P. 23 limits the discretion of appellate courts to modify initial orders respecting the custody of prisoners. *Jago v. United States District Court, Northern District of Ohio*, 570 F.2d 618, 625 (6th Cir. 1978). Absent a showing of "special reasons", the decision of the district court governs review in this court. *Id.*; Fed. R. App. P. 23(d). Anderson has failed to meet this burden.

Accordingly, the respondent's motion is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman /s/
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORNELL FULLER, Petitioner, v. CHARLES E. ANDERSON, Respondent.	Civil No. 79-73171

ORDER GRANTING BAIL PENDING APPEAL

At a session of said Court, held in the United States Courthouse, City of Detroit, County of Wayne, State of Michigan, on the sixth day of January, 1981.

Present: The Honorable John Feikens Chief United States District Judge.

Upon motion of the Petitioner, Cornell Fuller;

IT IS HEREBY ORDERED that the Petitioner, Cornell Fuller, be granted release during the pendency of any appeal, provided that he execute a bond in the amount of $10,000.00 and deposit in the registry of the Court the sum of $1,000.00 in security, as evidenced by the assignment of an interest in property by his mother, Hattie Fuller, more particularly described as Lot 264 MARSHLAND BOULEVARD SUB. recorded in Liber 26, Page 92 of Plats, Wayne County Records, and known as 840 Marlborough, and subject to a mortgage to Graham Mortgage Company, such deposit to be returned

upon the Court's determination that the Petitioner has performed the conditions of his release.

John Feikens /s/
John Feikens
Chief United States District Judge

January 6, 1981

[395 MICH at 453]

WILLIAMS, J. This court has steadfastly supported the right of the trier of fact, particularly the jury, to believe, or disbelieve, in whole or in part, any of the evidence presented. The instant case involves this doctrine.

As my brother the Chief Justice in his opinion observes, "There was uncontradicted testimony that 16-year-old Zerious Meadows started the fire by throwing a Molotov cocktail, and by striking a match." However, as he correctly notes, the question before us is not whether defendant Cornell "Fuller planned the arson, or that he lit the fire, but rather that he acted as a lookout for Meadows by standing by the back gate of the yard and looking up and down the alley."

In our opinion, evidence was presented which, if believed by the jury, would show just that. This is

[395 MICH at 454]

not a case of "mere presence at the scene", for, if the jury believed it, defendant's activities were consonant with a theory of active participation in the crime.

The Chief Justice in his opinion carefully lays out the testimony of the important witnesses. There is no need to repeat this material in this opinion.

The jury could connect Fuller with Meadows who perpetrated the arson, because, as the Chief Justice summarized,

> "One witness testified she saw five or six boys huddled together on the sidewalk in front of the Turner home before it burned. She identified one of the boys as Fuller. She said she saw him go through the gate to the back yard of the Turner home. She saw another of the boys in front throw something at the house and the house caught fire. She identified one of the other boys as a boy named 'Jefferey'."

This boy was Jefferey Coleman, whose testimony, well set out by the Chief Justice, described Fuller's role in the crime. Even if we eliminate Jefferey Coleman's speculation that "I guess he [Fuller] was watching out for Zerious", he still testified that defendant was looking back and forth "to Jefferson" and "back towards Kercheval" several times and that after the fire started, Fuller and Meadows together took off and ran toward Kercheval.

Another witness, Gary Martin, in the words of the Chief Justice, "testified that he saw Cornell Fuller, Zerious Meadows and four others walking together in the alley between Fairview and LeMay going towards Jefferson. He said he next saw Fuller and Meadows run through a yard and then run down to Kercheval through the alley."

[395 MICH at 455]

It is for the trier of fact to determine if the prosecution has "negate[d] every reasonable theory consistent with the defendant's innocence of the crime charged". It was so determined in this case.

Conviction affirmed.

COLEMAN and FITZGERALD, JJ., concurred with WILLIAMS, J.

LINDEMER and RYAN, JJ., took no part in the decision of this case.

T. G. KAVANAGH, C.J., (*dissenting*). Cornell Fuller was convicted of first-degree felony murder, MCLA 750.316; MSA 28.548, by a jury.

Because we are satisfied after a thorough review of the record that there was insufficient evidence to support conviction, we set this verdict aside.

On May 18, 1970, two young girls lost their lives in a fire asserted to be caused by arson. There was uncontradicted testimony that 16-year-old Zerious Meadows started the fire by throwing a Molotov cocktail, and by striking a match. The prosecution did not allege that Fuller planned the arson, or that he lit the fire, but rather that he acted as a lookout for Meadows by standing by the back gate of the yard and looking up and down the alley.

One witness testified she saw five or six boys huddled together on the sidewalk in front of the Turner home before it burned. She identified one of the boys as Fuller. She said she saw him go through the gate to the back yard of the Turner home. She saw another of the boys in front throw something at the house and the house caught fire. She identified one of the other boys as a boy named "Jefferey". She testified she did not see anything unusual at the rear of the Turner home because she could not see that far.

[395 MICH at 456]

Fourteen-year-old Jefferey Coleman testified that he saw Zerious Meadows, on the back porch with a Coca Cola bottle

in his hand, light a rag in the bottle and throw it against the porch. He said he saw Cornell Fuller "standing by the gate" in the back yard. The following colloquy then occurred:

"Q. Now after he [Meadows] had struck the match and started the second fire what happened then?

"A. Well, he had jumped off the porch and then they ran down the alley towards Kercheval.

"Q. When you say they ran down the alley, who ran down the alley?

"A. Zerious and Cornell.

"Q. Towards Kercheval.

"A. Yes, sir.

"Q. During the time that Zerious Meadows was throwing the bottle against the side of the house or against the side of the porch and lighting the match which set—started the second fire did you see what Cornell Fuller was doing?

"A. He was still standing by the gate, looking around.

"Q. When you say he was looking around what, exactly, was he doing?

"A. I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval.

"Q. He looked towards Jefferson and looked back towards Kercheval?

"A. Yes, sir.

"Q. Did he do that once or more than once?

"A. He did it more than once.

"Q. He did it more than once—how many times—

"The Court: Was this the alley gate or the gate toward the front of the house?

"A. It was the alley gate.

"Q. How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kerchevel?

"A. I wouldn't know.

[395 MICH at 457]

"Q. But it was more than once; is that correct?

"A. Yes, sir.

"Q. Was it more than twice?

"A. Yes, sir.

"Q. Now, during the time that this was taking place, Jefferey, did you hear any words spoken between Zerious and Cornell?

"A. No.

"Q. Did you say anything to them?

"A. No.

"Q. Now, after—strike that, please—after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

"A. Yes, sir.

"Q. Did they enter the alley?

"A. Yes, sir.

"Q. Did they enter the alley through the gate that Cornell Fuller was standing by?

"A. Yes, sir.

"Q. And then they started running; is that correct?

"A. Yes, sir.

"Q. Were they running together or separately, Jefferey?

"A. Together.

"Q. And they were running towards Kercheval; is that correct?

"A. Yes, sir.

Gary Martin testified that he saw Cornell Fuller, Zerious Meadows and four others walking together in the alley between Fairview and LeMay going towards Jefferson. He said he next saw Fuller and Meadows run through a yard and then run down to Kercheval through the alley.

The testimony summarized above was the entire evidence linking Cornell Fuller with the arson and resulting deaths. At the conclusion of the prosecution's case, Fuller's attorney moved for a directed

[395 MICH at 458]

verdict of acquittal. The trial judge in denying the motion said:

> "The Court: The question in this case is a close one. As I regard the testimony the defendant's complicity in the case depends almost completely on the fact that he was present at the scene of the crime and that he was seen going to it and seen running afterwards. There was very meagre evidence to call him a look-out in this particular case; however, the Court is of the impression that we do have a borderline prima facie case in this instance—a borderline prima facie case—and, accordingly, the court will reserve its ruling on the motion for a directed verdict. It seems to me that the testimony is the kind that would be—that there would be a high probability that the jury would return a verdict of not guilty in this case, but where there is a prima facie case the Court cannot speculate on it—on the jury's decision in the case and the Court will, however, reserve a ruling on the motion."

After the jury returned a guilty verdict, a motion to set aside that verdict as against the great weight of the evidence was denied.

The record does not contain sufficient evidence to support a conviction of felony murder against this defendant. In a prosecution for felony murder, the felony must be proven independently of the murder. *People v Allen*, 390 Mich 383; 212 NW2d 21 (1973). Arson is a specific intent crime, and proof of the corpus delicti requires the showing not only that the building was burned but that the fire was intentionally set. *Peterson v Oceana Circut Judge*, 243 Mich 215; 219 NW 934 (1928). There was inadequate proof of Fuller's intention to act in concert with Zerious Meadows to set this fire.

The prosecution did not contend that Fuller assisted in planning this arson; they argued rather that he acted as a "lookout" for Meadows, *i.e.*, that

he was an "aider and abettor". The fact that Fuller and Meadows were seen together—that Fuller was seen by the alley "standing by the gate, looking around" does not establish his being a lookout for an arsonist.

Jeffrey Coleman's *speculation* as to what Fuller was doing—"I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval"—is not sufficient to allow a conclusion to be drawn that Fuller *was* acting as a lookout. In *People v Davenport*, 39 Mich App 252, 257-258; 197 NW2d 521 (1972), it was said:

> "It has been said that in a criminal case 'not only must each of the facts from which the inference is drawn be proved beyond any reasonable doubt, but the inference itself must be such as admits of no other rational conclusion'. *People v Sessions*, 58 Mich 594, 606 (1886) (per Sherwood, J). Accord: *Miller v State*, 250 Ind 338; 236 NE2d 173 (1968): 'An inference, to be valid, must be logical [citation omitted]. It must follow as an impelling certainty from the circumstantial evidence which mothers it, or it is not proper.' Similarly, see *State v Faircloth*, *supra* [181 Neb 333; 148 NW2d 187 (1967)].
>
> "Allowing a trier of fact to draw an inference in a criminal case only if the inference follows with 'impelling certainty' enforces the requirement that, where the people's case is based on circumstantial evidence, the prosecution must negate every reasonable theory consistent with the defendant's innocence of the crime charged."

There are simply too many inferences that would have to be drawn, one piled upon another, to justify conviction of

this defendant. The prosecution has not negated "every reasonable theory consistent with the defendant's innocence of the crime charged". The due process clause "protects the accused against conviction except upon proof

[395 MICH at 460]

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

Fuller's presence at or near the scene of this crime will not support a conclusion of his direct participation or of aiding and abetting.

> "'Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval sufficient, nor passive acquiescence or consent.'" *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931).

In *Burrel*, defendant and one Bracken picked up a girlfriend of Bracken's in defendant's automobile. Defendant, as directed by Bracken, parked the car while Bracken had sexual intercourse with the underage girl in the back seat. Defendant sat in the front seat with his arms over the steering wheel and his head resting on his arms. Defendant was convicted of statutory rape as an aider and abettor.

That conviction was reversed because there was no evidence to show that defendant knew when he took Bracken and the girl into his car and before parking that Bracken intended statutory rape, and "[i]f it be inferred that, after stopping the car, he knew what his guests were doing in the back of the car, it makes no difference * * *". *Id.*

So it is in the case at bar. There is no evidence that defendant knew that Meadows planned to set fire to the Turner house. There is no evidence that defendant agreed to assist Meadows in burning the house.

While defendant may have been in a position to

[395 MICH at 461]

observe what Meadows was doing or to warn him of danger, from this fact alone it is not reasonable to conclude that he agreed to act as a lookout or that he did in fact assist Meadows in perpetrating the crime.

We would reverse the conviction and discharge the defendant.

LEVIN, J., concurred with T. G. KAVANAGH, C.J.

PEOPLE v FULLER

[44 Mich App at 298]

Before: QUINN, P.J., and V. J. BRENNAN and O'HARA,* JJ.

QUINN, P.J. A jury convicted defendant of first-degree murder, MCLA 750.316; MSA 28.548, and he was sentenced. His application for delayed appeal was granted.

On May 18, 1970, a residential fire occurred at 1554 Lemay in Detroit which claimed the lives of two young girls. A cause of the fire was a Molotov cocktail thrown at the residence by one Meadows. The prosecution claimed that defendant

*Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

aided and abetted Meadows by acting as a lookout while the latter threw the Molotov cocktail. Other facts will

[44 Mich App at 299]

be noted in the discussion of the issues raised on appeal.

The first issue is a weight of the evidence question. Our inquiry is, was evidence produced which, if believed, could certainly lead to a reasonable inference that defendant was a party to the offense?, *People v Ford*, 19 Mich App 519 (1969). There was evidence that defendant came to the scene with Meadows and others; that defendant stood at a gate near the alley behind the house while Meadows lit and threw the Molotov cocktail; that during this time, defendant looked up and down the alley more than once; and that defendant ran from the scene with Meadows. From these facts a jury could reasonably infer that defendant was a party to the offense.

During final argument, the prosecuting attorney commented on the failure of defendant to produce additional alibi witnesses. Defendant now claims that this constitutes an impermissible inference of guilt. No objection to the comment was made at trial. The defense was alibi and the one alibi witness produced named others who were present when defendant was allegedly in the presence of the alibi witness. It was not shown that the others were unavailable. That the comment complained of was proper see *People v Falkner*, 36 Mich App 101 (1971).

We find no merit in defendant's contentions that the trial court affirmatively mislead the jury with respect to sentence and that sentence constituted cruel and unusual punishment.

At trial, defendant offered to stipulate that a burning took place and that two deaths occurred as a result thereof. The

prosecuting attorney declined the offer and put in his proof of these facts. Defendant asserts error because he claims the

[44 Mich App at 300]

prosecuting attorney's refusal permitted prejudicial and unnecessary evidence to be heard by the jury. The refusal to accept the offer cannot be the basis of error, however. As stated in *People v MacPherson*, 323 Mich 438 (1949):

> "Furthermore, the prosecutor had the right to prove by competent testimony the facts material to the people's case. Counsel for defendant could not preclude the exercise of such right by undertaking to make an admission on behalf of his client."

The testimony of witness Coleman was crucial to the prosecution. It is apparent from the record that Coleman had a juvenile record, in addition to his current record of being in the youth home for running away from home. Defendant concedes that no request for this record was made to the prosecuting attorney. The record does not disclose that the prosecuting attorney had Coleman's past juvenile record or that the prosecuting attorney knew of this record. Defendant now contends that his due process rights were violated because the prosecuting attorney failed to disclose a record it is not shown the prosecuting attorney had or knew about. If the trial record disclosed that the prosecuting attorney had, controlled, or knew of Coleman's past juvenile record, we would reverse, *People v Nettles*, 41 Mich App 215 (1972). Absent a showing that the prosecuting attorney possessed, controlled, or knew of the past juvenile record or that defendant requested its production no violation of his rights is shown.

In addition, on cross-examination of Coleman, defense counsel voluntarily stopped the cross-examination after Cole-

man had acknowledged that his current residence was the youth home and that he was there as a runaway. Further inquiry could well have disclosed the prior juvenile record.

[44 Mich App at 301]

During Coleman's testimony, he gave the unresponsive conclusion that Fuller was "watching out for Zerious [Meadows]". No objection was made to this conclusionary statement. The issue was not preserved for appeal.

Affirmed.

All concurred.

[421] • • •

THE COURT: The motion will be denied.

This case was tried by a jury and the Court, of course, also heard the testimony in the case and would find that there was testimony in this case not only making Out a prima facie case but justifying the jury in finding facts along the following lines:

That, on the morning in question, the defendant, Cornell Fuller, in company with a number of other young men and, particularly, one 16 year old juvenile, came to the house where the arson-murder is alleged to have taken place and that the evidence is sufficient to indicate that at that time they brought with them a device consisting of a Coca Cola bottle filled with gasoline and with a cloth or paper wick which is commonly known as a firebomb or "Molotov Cocktail."

The evidence does not indicate in the case where this device was made but the evidence would [422] indicate that it was not made at the scene of the crime because there was no

container disclosed in the evidence for the gasoline in the case. The young men went to the front of the house that was burned and some of them were seen by witnesses to go into the backyard, including the 16 year old juvenile, who was identified as the one who lit and actually threw the firebomb against the house; the defendant, Cornell Fuller, who was present in the yard, was identified as a look-out or accessory.

Now, in view of the fact that this firebomb was obviously constructed at some other point before it was brought into the backyard and thrown into the house or onto the House, all persons who came with the juvenile and who helped to bring the firebomb could, and the jury could have found, that they participated in this particular crime and, particularly, the defendant, Cornell Fuller, who was in the backyard and who was observed looking up and down the alley and who, after the burning of the house, ran away with the juvenile who actually threw the bomb—the firebomb.

The Court submitted the case to the jury on the question that under the facts of the case the [423] defendant, Cornell Fuller, having been present and participated, and having participated in the burning of the house was, under the statute, which is Section 767.39, chargeable as a principal, the same as the man who actually threw the firebomb in this case.

The testimony in the case, of course, indicated the terrible results of the throwing of the firebomb; the house was burned; a large family was forced to flee; the two young girls who were in the attic were burned to death. The other members of the family were forced to jump from the second floor and some of them were burned and injured, and it was a tragic circumstance.

The Court would find that there was sufficient evidence to submit the case to the jury on the People's theory of the

case. The jury found that the defendant was guilty of murder in the first degree and your motion will, accordingly, be denied, Mr. Reilly.

MR. REILLY: Thank you, your Honor.

• • •

STATE OF MICHIGAN
IN THE RECORDER'S COURT OF
THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN Vs. CORNELL FULLER, Defendant.	Docket No. 70 03305

OPINION & ORDER DENYING MOTION FOR NEW TRIAL, SUPPLEMENTAL MOTION FOR NEW TRIAL, AND MOTION FOR PRODUCTION OF CONTACT REPORTS

At a session of said Court, held in the Frank Murphy Hall of Justice, at Detroit, Wayne County, Michigan, on Dec. 15, 1971.

PRESENT: HON. THOMAS L. POINDEXTER, Judge of Recorder's Court.

In this case the defendant, Cornell Fuller, was tried on a charge of arson murder in the first degree and was found guilty by a jury in this case.

It was not contended that the defendant was the one who threw the fire bomb which burned the house, but the evidence

established that he was the look-out while Zerious Meadows (subsequently tried in a separate case on this same charge) threw the fire bomb and set a fire by pouring gasoline on the dwelling in question.

Defense counsel in his Motion for a New Trial makes much of the fact that Cornell Fuller was only seen to run to the alley of the premises here involved and look up and down the alley, but the evidence also indicated that he was the look-out and, therefore, an accessory to the crime, equally chargeable as a principal under Section 767.26, Compiled Laws, 1948.

This motion was held for some time by the Court pending the trial of Zerious Meadows on the same charge but in a separate case. At the time of the trial of Cornell Fuller, Zerious Meadows, a 16 year old boy, was not bound over for trial by the Juvenile Court and could not be tried in the first case for the death of the young girl there involved.

After the trial of Cornell Fuller a second charge was placed against Zerious Meadows for the death of a second young girl in the burning of the same premises involved in the Fuller case, and Zerious Meadows has since been convicted of murder in the first degree in a trial by jury before a different Court. The reason the Court held this matter was that it seemed only fair that if there should be an acquittal, or a conviction on a lesser offense, in the trial of Zerious Meadows that Cornell Fuller, as the accessory, should not be punished for a higher degree of offense than Zerious Meadows. Both have now been found guilty of murder in the first degree.

Nobody has attempted to point out any errors in the charge of the Court, or in the manner of the conduct of the trial; however, Defense Counsel now, as part of his motion for a new trial, asks that the Prosecuting Attorney be required to

furnish contact reports from the Juvenile authorities, relating to two of the juvenile witnesses in this case.

This motion is denied for the reasons contained in the brief of the Prosecuting Attorney, and also in the attaached memorandum prepared by Mr. Lynn L. Lower, Legal Research Aide of this Court, who has prepared an extensive memorandum which clearly sets forth the issues of law that this Court adopts as the Opinion of the Court in relation to the contact reports.

The Motions are, accordingly, DENIED.

THOMAS L. POINDEXTER /s/
Judge of Recorder's Court

(Attachment)

Distribution:

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Prosecuting Attorney

Defense Counsel